

Message Text

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EXDIS

E.O. 11652: N/A
TAGS: ILO
SUBJECT: L OPINION ON SUSPENSION OF WITHDRAWAL FROM ILO MEMBER-
SHIP BY FAILURE TO PAY ASSESSMENTS

REF: (A) STATE 176331, (B) GENEVA 6030

FOR L/ALDRICH AND IO/MAYNES FROM SCHWEBEL

1. GREATLY APPRECIATE REFTTEL (A). FOLLOWING ARE SCHWEBEL'S
COMMENTS ON L'S OPINION. AMBASSADOR VANDEN HEUVEL CONCURS IN THESE
COMMENTS, AND HE TAKES STRONG EXCEPTION TO L'S CONCLUSION THAT "IT
IS HIGHLY QUESTIONABLE WHETHER WE COULD SUSPEND OUR NOTICE OF IN-
TENT TO WITHDRAW BY FAILING TO SATISFY OUR OUTSTANDING FINANCIAL
OBLIGATIONS."

2. AS L'S OPINION ACKNOWLEDGES, A LITERAL READING OF ARTICLE 1,
PARAGRAPH 5 OF THE ILO CONSTITUTION CLEARLY ADMITS, INDEED SUPPORTS,
THE CONSTRUCTION THAT, WHERE A MEMBER STATE HAS NOT FULFILLED AN
OBLIGATION OF MEMBERSHIP, ITS WITHDRAWAL SHALL NOT "TAKE EFFECT".
THE VIENNA CONVENTION ON THE LAW OF TREATIES (WHICH IS OF COURSE
RELEVANT SINCE THE ILO CONSTITUTION IS A TREATY) ESTABLISHES AS
THE PARAMOUNT CANON OF TREATY INTERPRETATION THE "ORDINARY
MEANING" OF A TERM. THE ORDINARY MEANING OF ARTICLE 1, PARA-
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GRAPH 5 IS THAT PAYMENT OF ALL FINANCIAL OBLIGATIONS IS A CON-
DITION PRECEDENT TO THE TAKING EFFECT OF WITHDRAWAL. ACCORDINGLY,
ON ITS FACE THE MISSION'S CONSTRUCTION OF THE ILO CONSTITUTION
IS COMPELLING.

3. THE QUESTION IS WHETHER WHAT THE VIENNA CONVENTION TREATS AS
"SUBSIDIARY MEANS" OF INTERPRETATION -- THE PREPARATORY WORK FOR

AND SUBSEQUENT PRACTICE UNDER A TREATY - WEAKEN THIS CONSTRUCTION AND, IF SO, HOW SERIOUSLY. (LET US PUT ASIDE THE ANTERIOR QUESTION OF WHETHER RESORT TO THE PREPARATORY WORK IN A CASE WHERE THE ORDINARY MEANING OF THE TERMS IS CLEAR IS APPROPRIATE, EVEN THOUGH IT MAY BE THAT, UNDER THE VIENNA CONVENTION, RESORT TO PREPARATORY WORK WOULD NOT BE APPROPRIATE IN THIS CASE.)

4. THE PREPARATORY WORK ON THE ISSUE IN QUESTION IN THE DRAFTING OF THE ILO CONSTITUTION IS MINIMAL: A FEW PASSAGES IN A REPORT OF THE INTERNATIONAL LABOR OFFICE WHICH WAS NEVER PASSED UPON BY THE ILO CONSTITUTIONAL CONFERENCE OF 1945 OR BY ANOTHER REPRESENTATIVE ILO ORGAN. AS L'S MEMORANDUM NOTES, THIS REPORT CONTAINS A SENTENCE WHICH REVIEWS THE WITHDRAWAL CLAUSE OF THE LEAGUE OF NATIONS COVENANT (WHICH DIRECTLY GOVERNED THE ILO IN LEAGUE DAYS) AND WHICH, AFTER NOTING PRACTICE UNDER THAT CLAUSE IN THE PRE-WORLD WAR II ERA, STATES THE FOLLOWING IN RESPECT OF THE COVENANT'S PROVISION THAT A STATE DESIRING TO WITHDRAW MUST HAVE FULFILLED ALL ITS INTERNATIONAL OBLIGATIONS AT THE TIME OF ITS WITHDRAWAL: "IN PRACTICE, THIS...CONDITION HAS NOT BEEN INTERPRETED AS INVALIDATING A PURPORTED WITHDRAWAL BY A STATE WHICH HAS NOT FULFILLED ITS INTERNATIONAL OBLIGATIONS, BUT MERELY AS PROVIDING THAT OBLIGATIONS WHICH SUCH A STATE HAS NOT FULFILLED AT THE TIME OF WITHDRAWAL SHALL CONTINUE TO SUBSIST DESPITE THE WITHDRAWAL." HOWEVER, WHEN, IN 1945, THE ILO FOR THE FIRST TIME ADOPTED ITS OWN CONSTITUTIONAL PROVISION ON WITHDRAWAL, IT DID SO ON THE BASIS OF THE FOLLOWING CONCLUSION WHICH THIS SAME ILO REPORT CONTAINS. ARTICLE LIMITED OFFICIAL USE

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1, PARAGRAPH 5, IT STATED, "WOULD MAKE CLEAR THAT NO MEMBER MAY WITHDRAW FROM THE ORGANIZATION WITHOUT GIVING NOTICE OF ITS INTENTION SO TO DO TO THE DIRECTOR AND THAT SUCH NOTICE WILL TAKE EFFECT TWO YEARS AFTER THE DATE OF ITS COMMUNICATION TO THE DIRECTOR, SUBJECT TO THE MEMBER HAVING AT THAT TIME FULFILLED ALL FINANCIAL OBLIGATIONS ARISING OUT OF MEMBERSHIP". THUS SUCH PREPARATORY WORK AS THERE IS MAY BE INTERPRETED AS SQUARELY SUPPORTING THE MISSION'S PROPOSAL IN THAT IT SPECIFIES THAT, FOR THE FUTURE INTERPRETATION OF THE REVISED ILO CONSTITUTION, THE TAKING EFFECT OF WITHDRAWAL WILL BE "SUBJECT" TO THE MEMBER'S HAVING FULFILLED ALL OF ITS "FINANCIAL OBLIGATIONS".

5. AS FOR THE SUBSEQUENT PRACTICE OF THE ILO, THERE ARE ONLY TWO PRECEDENTS WHICH BEAR ON THE INTERPRETATION OF ARTICLE 1, PARAGRAPH 5, THOSE OF ALBANIA AND SOUTH AFRICA. BOTH CASES MAY BE DISTINGUISHED FROM THAT OF THE UNITED STATES AND ON TWO GROUNDS. FIRST, UNLIKE THE UNITED STATES, NEITHER ALBANIA NOR SOUTH AFRICA PURPORTED TO WITHDRAW FROM THE ILO ON THE BASIS OF AND IN ACCORDANCE WITH ARTICLE 1, PARAGRAPH 5. BOTH RATHER MAINTAINED THAT THEY WITHDREW IN RESPONSE TO VIOLATIONS BY THE ILO OF CONSTITUTIONAL PROVISIONS. FOR ITS PART, THE ORGANIZATION TOOK ACCOUNT OF THE REALITY OF THEIR WITHDRAWAL, IN EFFECT,

THOUGH NOT FORMALLY OR EXPRESSLY, ACQUIESCING IN ITS INABILITY TO IMPLEMENT ARTICLE 1, PARAGRAPH 5 SO AS TO REQUIRE PAYMENT OF FINANCIAL OBLIGATIONS AS A CONDITION OF WITHDRAWAL IN CIRCUMSTANCES WHERE THE TWO MEMBERS CONCERNED TREATED ARTICLE 1, PARAGRAPH 5 AS A NULLITY. SECOND, AS THE USG LETTER OF INTENT TO WITHDRAW STRESSES, IT IS NOT THE DETERMINATION OR PREFERENCE OF THE USG TO WITHDRAW; ON THE CONTRARY, THE LETTER STATES THAT THE U.S. HOPES TO REMAIN A MEMBER. BUT ALBANIA AND SOUTH AFRICA WERE DETERMINED TO WITHDRAW IMMEDIATELY AND THE ILO SAW PRACTICAL VALUE IN THEIR WITHDRAWAL BEING IMMEDIATELY EFFECTED. IN THIS CASE, FAR FROM DESIRING U.S. WITHDRAWAL, THE INTERNATIONAL LABOR OFFICE AND MANY MEMBERS HAVE MADE CLEAR THEIR PROFOUND DESIRE THAT THE U.S. REMAIN A MEMBER. FURTHERMORE, THE ALBANIAN AND SOUTH AFRICAN CASES ARE QUESTIONABLE PRECEDENTS, SINCE THEY DO LIMITED OFFICIAL USE

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NOT CONSTITUTE, IN THE WORDS OF ARTICLE 31 OF THE VIENNA CONVENTION, "SUBSEQUENT PRACTICE IN THE APPLICATION OF THE TREATY WHICH ESTABLISHES THE AGREEMENT OF THE PARTIES REGARDING ITS INTERPRETATIONS". THE ILO MOST DEFINITELY DID NOT AGREE WITH ALBANIA AND SOUTH AFRICA ON THE LEGALITY OF THEIR WITHDRAWAL.

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6. IN INTERPRETING A TREATY PROVISION WHICH MAY BE OPEN TO MORE THAN ONE INTERPRETATION, THE INTERPRETATION SHOULD BE CHOSEN WHICH IS MOST CONSISTENT WITH THE TREATY'S PURPOSES. IN THIS CASE, THE INTERPRETATION TO BE CHOSEN SHOULD FURTHER

NOT ONLY THE PURPOSES OF THE ILO'S CONSTITUTION BUT THE VIABILITY OF THE ORGANIZATION. THE RECORDS OF THE 1945 CONSTITUTIONAL CONFERENCE MAKE CLEAR THAT UNIVERSALITY OF MEMBERSHIP IS A PRIMARY PURPOSE OF THE ILO. OBVIOUSLY THAT UNIVERSALITY AND VIABILITY WILL BE SEVERELY PREJUDICED BY U.S. WITHDRAWAL. IN THAT LIGHT, THE MISSION'S FORMULA FOR PROLONGING THE ORGANIZATION'S UNIVERSALITY IS THE MORE PALUSIBLE.

7. APPLYING THE CANONS OF TREATY INTERPREATION, READING THE PREPARATORY WORK AS ABOVE, AND DISTINGUISHING THE ALBANIAN AND SOUTH AFRICAN CASES AS WE DO, WE CONCLUDE THAT THE MISSION'S APPROACH IS LEGALLY SOUND AND LEGALLY DEFENSIBLE. THAT IS NOT TO SAY THAT IT IS NOT SUBJECT TO ATTACK, EVEN IF THE DIRECTOR GENERAL OR HIS LEGAL COUNSEL WERE TO ISSUE AN OPINION SUPPORTING IT (FYI: THEY DO INDEED SUPPORT THE PLAN'S LEGALITY). L'S MEMORANDUM IS ALTOGETHER RIGHT IN POINTING OUT THAT, DESPITE SUCH A LEGAL OPINION, OUR APPROACH COULD BE CHALLENGED, PERHAPS SUCCESSFULLY, IN THE ILO CONFERENCE AND THE INTERNATIONAL COURT OF JUSTICE.

8. WE AGREE AS WELL THAT OUR APPROACH MAY HAVE THE EFFECT OF THE LIMITED OFFICIAL USE

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U.S. RELYING ON ITS OWN APPARENT FAILURE TO MEET AN INTERNATIONAL OBLIGATION TO ASSERT THE RIGHT OF CONTINUED MEMBERSHIP AND THAT THIS MIGHT APPEAR, AS L PUTS IT, TO BE "UNSEEMLY". IT COULD BE SUBJECT TO THE CRITICISIM OF VIOLATING THE LEGAL PRINCIPLE THAT NO LEGAL RIGHT MAY SPRING FROM A WRONG. HOWEVER, AT LEAST UNTIL THE PAYMENT OF THE PARTICULAR ASSESSMENT IS OVERDUE, THERE WOULD BE NO WRONG AND, IN ANY EVENT, THE U.S. WOULD MAKE CLEAR ITS ULTIMATE INTENTION TO MEET ALL ITS OBLIGATIONS. ANY DANGER OF DISRUPTION OF ILO FINANCES, ACTIVITIES AND PLANNING COULD BE MITIGATED BY A U.S. ASSURANCE TO THE ILO THAT IT WILL NOT COMPLETE PAYMENT OF OUTSTANDING FINANCIAL OBLIGATIONS AND THUS CONSUMMATE WITHDRAWAL EXCEPT UPON A PERIOD OF NOTICE (E.G., SIX MONTHS). AS INDICATED, THE U.S. WOULD BE BOUND TO PAY ALL ASSESSMENTS UPON IT FOR THE WHOLE PERIOD OF ITS MEMBERSHIP, INCLUDING ANY POST-NOVEMBER 1977 PERIOD.

9. WE DO NOT OF COURSE SUGGEST THAT THE MISSION'S APPROACH IS THE ONLY OR EVEN NECESSARILY THE BEST APPROACH WHICH CAN BUY TIME AND ALLOW POSITIVE DEVELOPMENTS TO MATURE. CONSIDERATION MIGHT ALTERNATIVELY OR ADDITIONALLY BE GIVEN TO THE PRESIDENT ANNOUNCING THAT THE U.S. NOTICE OF WITHDRAWAL WILL NOT TAKE EFFECT BEFORE, E.G., NOVEMBER 1978 REPEAT 1978. THE STRONG LEGAL AGUMENTS FOR THIS APPROACH ARE SUMMARIZED IN THE NOTE ON "POSSIBLE EXTENSION OF A NOTICE OF WITHDRAWAL" WHICH SCHWEBEL PASSED TO MAYNES ON HIS DEPARTURE FROM GENEVA. WE ARE CERTAIN THAT THE INTERNATIONAL LABOR OFFICE WOULD SUPPORT (AND PREFER) THIS APPROACH, AS IT WOULD SUPPORT THAT OF THE MISSION. WHETHER, HOWEVER, A DIRECT EXTENSION OF THE NOTICE OF WITHDRAWAL, REQUIRING AN AFFIRMATIVE

INITIATIVE OF THE PRESIDENT, WOULD HAVE THE POLITICAL, DOMESTIC ADVANTAGES OF THE APPROACH WE HAVE SUGGESTED, WASHINGTON CAN BEST JUDGE. OF COURSE, IN ANY CHALLENGE TO OUR MAINTENANCE OF MEMBERSHIP, WE WOULD BE IN THE BEST POSITION IF WE HAD FAILED TO PAY FINAL ASSESSMENTS AND ALSO HAD EXTENDED OUR NOTICE OF WITHDRAWAL, LIMITED OFFICIAL USE

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BECAUSE, IF WE WON ON JUST ONE GROUND, THAT WOULD SUFFICE.

10. VANDEN HEUVEL WANTS TO REITERATE THE NECESSARY CONTEXT IN WHICH THE OPTION PROPOSED IN GENEVA 6030 WOULD BE EXERCISED. PRESIDENT'S CHOICE OF AN OPTION TO EXTEND LETTER OF INTENT TO WITHDRAW THROUGH STATEMENT TO THAT EFFECT OR BY WITHHOLDING FINAL ASSESSED PAYMENT (OR BOTH) SHOULD NOT APPEAR AS U.S. INITIATIVE, BUT RATHER AS U.S. RESPONSE. CAREFUL ORCHESTRATION IS OBVIOUSLY REQUIRED. IMEC CONSULTATIONS HERE PROVIDE FIRST STEP INASMUCH AS IMEC COUNTRIES UNANIMOUSLY REQUEST U.S. TO CONTINUE ILO MEMBERSHIP. IN VANDEN HEUVEL'S OPINION, IMEC WOULD WELCOME PROPOSAL WHICH, BY WHATEVER MODALITY, EXTENDS EFFECTIVE DATE OF WITHDRAWAL LETTER, AND U.S. SHOULD REQUIRE IME EXPRESS SUPPORT OF ANY RESULTING PUBLIC STATEMENT. FURTHER, GOE ATTITUDE AS EXPRESSED TO MAYNES THROUGH FOREIGN MINISTER GIVES U.S. OPPORTUNITY TO TEST GOE AND G-77 ATTITUDES BY SEEKING PRELIMINARY SUPPORT IN EXTENSION OPTION CHOICE. ALSO, WE MUST REMEMBER THAT, PRACTICALLY SPEAKING, THE INTERNATIONAL COURT OF JUSTICE IS UNLIKELY TO RENDER AN ADVISORY OPINION AT ALL, AND UNLIKELIER STILL TO DO SO, BEFORE JULY 1978, BY WHICH TIME U.S. FINAL DECISION WILL BE MADE IN THE LIGHT OF 1978 ILO CONFERENCE RESULTS.

11. AMBASSADOR VANDEN HEUVEL SAYS THAT SINCE HE IS UNAWARE OF EXTENT OF CIRCULATION OF L OPINION AS EXPRESSED STATE 176331, HE REQUESTS THAT THIS CABLE BE CIRCULATED TO SAME GROUP.
VANDEN HEUVEL

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Message Attributes

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